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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR OF THE ESTATE OF F. W. C. BOESCHE, DECEASED, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law (R. 22–25) are unreported. The opinion of the court of appeals (R. 27–29) is reported at 303 F. 2d 204, 206.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1961 (R. 29). An order vacating the judgment was entered February 21, 1962 (R. 35). On June 15, 1962, the court of appeals reinstated the original judgment of November 16, 1961 (R. 36). The petition for a writ of certiorari was filed on August 14, 1962, and granted on November 5, 1962. 371 U.S. 886.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority to cancel an oil and gas lease issued in violation of the Department's regulations and in derogation of a competing applicant's statutory preference rights.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are printed in the Appendix A, *infra*, pp. 43–49.

STATEMENT

Section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. 226, authorizes the Secretary of the Interior to grant oil and gas leases on lands in the public domain. If, as in this case, the lands are not within a known geologic structure, "the person first making application for the lease who is qualified to hold a lease under [the statute] shall be entitled to a lease of such lands without competitive bidding."[1] The regulations provide that an offer for such a noncompetitive lease "may not be for less than 640 acres except * * * [w]here the land is surrounded by lands not available for leasing * * *." 43 C.F.R. 192.42(d). If an offer is for less than 640 acres and is not within the exception, the regulations direct that the "offer will be rejected and * * * will afford the applicant no priority * * *." § 192.42(g)(1).

[1] Leases of lands within known geologic structures are awarded by competitive bidding to the qualified bidder offering the highest bonus.

In September 1956, an 80-acre tract in Oklahoma became available for noncompetitive leasing. Adjoining it was a 40-acre tract which was also available for leasing but for which one Connell had already filed an application. On September 11, 1956, the petitioner [2] filed an offer to lease the 80-acre tract. Minutes later, Vincent Cuccia and George E. Conley jointly applied for a lease of the entire 120 acres. On December 1, 1956, in action not questioned in these proceedings, a lease on the 40-acre tract was issued to Connell on his prior application, thus leaving only the 80-acre tract available (R. 24).

On November 15, 1957, the Manager of the Santa Fe Land Office of the Bureau of Land Management issued a lease on the 80-acre tract to petitioner. In due course, on January 24, 1958, the Manager notified Cuccia and Conley of that action and the consequent rejection of their application (R. 11, 24). The notice of rejection advised them of their right to appeal the decision to the Director of the Bureau in accordance with the regulations. An appeal was duly taken within the 30-day period allowed by the regulations. 43 C.F.R. (1962 Supp.) 221.1–221.2. The Director reversed the Manager's decision, holding that the failure of the petitioner's application to include the adjoining 40-acre tract made the offer inadequate under the minimum-acreage regulation (§ 192.42(d)); required its rejection and the denial of any priority

[2] Petitioner is actually the administrator of the estate of the original applicant, but for simplicity we will ignore the distinction.

to petitioner (§ 192.42(g)(1)); and thus made Cuccia and Conley the "first" qualified applicant entitled to the lease under Section 17 of the Act. He accordingly directed, subject to petitioner's right of appeal to the Secretary, that the lease issued to petitioner be canceled and a lease for the tract be issued to Cuccia and Conley (R. 12–14). On petitioner's timely appeal, the Secretary (through his delegate, the Deputy Solicitor) affirmed the decision of the Director (R. 15–18).

Petitioner filed a complaint in the district court for the District of Columbia to review the decision of the Secretary (R. 4–9). The district court granted summary judgment for the respondent, upholding both the Secretary's interpretation of the minimum-acreage regulations and his power to cancel a lease erroneously issued to one of two competing applicants in order to award it to the other (R. 22–25). The court of appeals affirmed (R. 27–29). On a claim of a conflict with a prior decision of the same court as to the Secretary's authority administratively to cancel leases, the court granted a petition for rehearing *en banc* (R. 35), but after hearing reargument it vacated the rehearing order and reinstated the original judgment (R. 36).

The petitioner filed a petition for certiorari asserting a conflict with the decision of the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649, certiorari denied, 366 U.S. 936. Agreeing that the decision was "squarely in conflict" with the

Pan American case and that the question was important, the respondent joined in urging that certiorari be granted. This Court granted certiorari but limited the issue to the question of the Secretary's power to cancel the lease because of the noncompliance of the application with the minimum-acreage regulation, thereby excluding the question, sought to be preserved by the petition (see Pet. 2, n. 1), whether the application did comply with the regulation (R. 37).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner's lease was cancelled by the Secretary, because the application was defective, in order to give effect to the declared policy of Congress to have mineral leases awarded to the first qualified applicant. Mineral Leasing Act of 1920, Section 17, 30 U.S.C. 226. Since petitioner's application was defective, the first qualified applicants were Cuccia and Conley jointly, whose application was pending at the time the lease was erroneously issued to petitioner. The Secretary acted as a result of the direct appeal by Cuccia and Conley from the action of the manager of the Santa Fe office denying their application, taken within the time allowed by departmental regulations. The exact question presented, therefore, is whether the Secretary had the power to cancel petitioner's lease, under those circumstances and for the reasons stated, or was powerless to correct the error and

award the competing applicants the lease to which they were jointly entitled.[3]

We submit that the Secretary has power to cancel a lease issued on an application which fails to comply with the controlling regulations. We need not find the power in the Mineral Leasing Act of 1920, as petitioner implies. The source of the power is the Secretary's long-standing statutory authority and duty to manage the public domain. The management of the public domain, we point out, requires thousands of recurring actions to be taken daily upon claims, surveys, entries, and applications of various sorts, including applications for leases. The actions are administrative routine, taken in local offices all over the country. Mistakes inevitably occur, like the error in the Santa Fe office in the present case. As we show below, the Secretary's power to correct such mistakes not only has been recognized in repeated decisions in analogous cases, but is essential both to

[3] We may have been guilty of overgeneralization in asserting in our memorandum in response to the petition for certiorari that the decision below is in square conflict with *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649, certiorari denied, 366 U.S. 936. The reasoning in the two opinions is diametrically opposed. Insofar as *Pan American* case rests upon the theory that Section 31 of the Mineral Leasing Act of 1920 withdrew from the Secretary of the Interior all power to cancel leases administratively, there may be no way of reconciling the decisions. In the *Pan American* case, however, the cancellation would not have been for the purpose of according a conflicting applicant his statutory priority, and the administrative proceedings involved were not the result of an appeal by another applicant from the denial of his application taken within the period allowed by departmental regulations.

protect the public interest and also to assure other applicants the benefit of their statutory rights.

This case cannot be distinguished from other established examples of the Secretary's power of cancellation upon the ground that a lease, like a land patent, confers legal title. The true distinction, we submit, is between a permanent conveyance of interests in a parcel of land, which puts it out of the public domain, and a transfer of a lesser interest, like a lease, which leaves the United States with continuing ownership and the Secretary with the responsibility for management.

The Secretary's power to cancel, contrary to petitioner's principal argument, was not withdrawn by Section 31 of the Mineral Leasing Act of 1920. Its provisions for cancellation and forfeiture look to breach of the conditions of the lease or violations of statutory requirements occurring after the lease was issued. They are in no way concerned with the correction of mistakes occurring in action upon the application, certainly not with those raised upon appeal from the denial of conflicting applications. The Secretary has exercised the challenged power for more than 40 years and Congress, despite every opportunity if it were dissatisfied, has declined to interfere.

The administrative power to cancel a lease under these circumstances is necessary to give effect to the rights of competing applicants. In the absence of some special arrangement a local land office takes up the applications on file in chronological sequence. It would be utterly impracticable to try to hold a formal

hearing upon each of thousands of applications, with notice to conflicting claimants and with the opportunity for each to be heard and appeal. The manager of the local office and his assistants act upon each application in turn. If the land is available, if the applicant is qualified, and if the application appears to conform to the regulations, a lease will issue. In due course the manager will come to each conflicting application filed before the lease was issued. He may realize his own mistake. More likely, he will find that none of the later applicants was the first qualified applicant and will, therefore, deny their applications. The notice of denial will give the later applicant his first formal notice that he has occasion to investigate and show, if he can, that he was in fact the first qualified applicant, and to appeal on this ground to the Director of the Bureau of Land Management and the Secretary of the Interior. Thus, given the nature of the land office's business, the existence of some power of cancellation, at least for as long as timely competing applications[4] are pending, is essential to secure the rights of competing applicants. In the present case, the correction also advances the public interest by giving effect to regulations designed to check the splitting up of tracts into small bits and pieces in the hands of separate lessees, a development which facilitates frauds, hinders the orderly exploitation of oil

[4] We use the term "timely conflicting applications" to define those filed before the lease is issued. Subsequent applicants are rejected by the Department, without permitting the late-filer to contest the validity of the lease issued.

resources, and increases paper work and problems of supervision.

The Department's actual management of lands available for leasing recognizes these practicalities. Although broader power exists, the practice has been to cancel leases for the present kind of non-conformity with the regulations only where the defect was pointed out on appeal from denial of a timely competing application. The departmental regulations, we will show, both establish and reflect the practice. In net effect the legal situation in this case is therefore the same as if the departmental regulations explicitly provided that all leases issued by a local land office are subject to review by a superior official for defects in the application or qualifications of the applicant until the Department has disposed of all timely competing applications. There can be no doubt of the power of the head of one of the busiest departments to reserve for a reasonable period the right to review the action of his subordinates either on direct appeal or, as here, on appeal from the denial of a timely competing application.

THE SECRETARY OF THE INTERIOR HAD POWER TO CANCEL PETITIONER'S LEASE

A. THE SECRETARY, INDEPENDENTLY OF THE MINERAL LEASING ACT, HAS ADMINISTRATIVE POWER TO CANCEL A LEASE ISSUED BY MISTAKE

For well over a century, the Secretary of the Interior has been "charged with the supervision of public business relating to * * * [p]ublic lands, in-

cluding mines." R.S. § 441; 5 U.S.C. 485.[5] He is directed to "perform all executive duties * * * in anywise respecting * * * public lands [of the United States]." R.S. § 453; 43 U.S.C. 2.[6] And he is expressly "authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of * * * [the Title dealing with public lands] not otherwise provided for." R.S. § 2478; 43 U.S.C. 1201.[7] See *Best* v. *Humboldt Placer Mining Co.*, No. 52, this Term, decided January 14, 1963. Clearly, this sweeping grant of authority is a sufficient basis for the Secretary's practice of reviewing, and cancelling, the erroneous issuance of a mineral lease. We need look no further for an affirmative grant of power.[8] As this court said in *Cameron* v. *United States*, 252 U.S. 450, 461, invoking these provisions to sustain the Secretary's cancellation of a mining location claim:

> True, the mineral land law does not in itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some

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[5] This provision may be traced to the Act of March 3, 1849, 9 Stat. 395, which created the Department of the Interior and transferred to it jurisdiction over the General Land Office.

[6] This provision derives from the Act of April 25, 1812, 2 Stat. 716, which created the General Land Office, subsequently brought under the jurisdiction of the Secretary of the Interior. See note 5, *supra*.

[7] The provision originates in the Act of September 28, 1850, 9 Stat. 520.

[8] The statutory basis of the power claimed by the Secretary immediately distinguishes the cases relied on by petitioner. Compare, *e.g.*, *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585.

> direction to the contrary, the general statutory provisions before mentioned vest it in the land department. * * *

The same power of cancellation or correction has been recognized in the Secretary, or his predecessor, the Commissioner of the General Land Office, in a variety of related situations. Thus, in *Harkness & Wife* v. *Underhill,* 1 Black 316, *Lee* v. *Johnson,* 116 U.S. 48, and *Orchard* v. *Alexander,* 157 U.S. 372, the administrative cancellation of homestead entries was upheld. In *Brown* v. *Hitchcock,* 173 U.S. 473, the Court affirmed the rescission of a selection list previously approved by the Secretary. And the same power of administrative cancellation has been sustained as applied to an erroneous survey, *Knight* v. *United States Land Association,* 142 U.S. 161, 181; a timber land entry, *Hawley* v. *Diller,* 178 U.S. 476, 488–490; and a lieu land selection, *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316.

These old cases show the venerable age of the rule that the Secretary of the Interior retains power to determine the validity of claims on the public domain of the United States. The principle has lost none of its vitality through the years. Its present force is attested by this Court's recent decision in *Best* v. *Humboldt Placer Mining Co., supra,* in which the "plenary authority" of the Department of the Interior to resolve questions relating to the validity of mineral claims is re-affirmed. As *Best* points out, the Department of the Interior performs a "special role" in

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the administration of the public lands and acts as a "special tribunal," so much so that a court with jurisdiction to decide should defer to the administrative process.

The power to cancel administrative action taken by mistake, when it relates to the management of land rather than a permanent conveyance, is essential to protect the public interest and give effect to statutory policies. The management of the public domain involves thousands of recurring decisions, taken daily, upon claims, surveys, entries and applications of various sorts, including applications for leases. Scattered local land offices, headed by a manager keep the tract books, serial registers and other records. They initially handle all transactions. In dealing with lands where there may be oil and gas and other minerals covered by the Mineral Leasing Act, the land office functions as a general real estate manager, whose duties include processing applications, issuing leases, approving assignments and extensions of leases, enforcing the terms of the leases, recording of the termination of leases, and similar matters.

In connection with the issuance of leases, applications must be checked to see that the land is leasable and that the applicant has satisfied the requirements of the regulations and is the party entitled to the lease. The magnitude of the mineral leasing program alone is indicated by the fact that on June 30, 1960, there were outstanding 139,000 leases supervised by the Department of the Interior under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30

U.S.C. 181 *et seq.*, which covered 113,000,000 acres. The total number of outstanding leases supervised by the Department under all programs—public lands, acquired lands, Indian, Naval Petroleum Reserve, and Outer Continental Shelf—was 159,000, covering 125,000,000 acres.

In many instances there are multiple applications for the same land, sometimes hundreds for a single tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the New Mexico office alone,[9] many of which affected the same acreage. In the normal treatment of the applications, there is no adjudication between adverse parties. The local office takes up the applications one at a time and reaches a managerial decision whether all requirements have been met by the particular applicant or, for a reason the manager states, the application should be rejected. In a program of this magnitude, it is inevitable that some mistakes will be made. In the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period. While no statistics are available for the period subsequent to June 30, 1960, the Department of the Interior advises us that the annual volume of leases and cancellations has not significantly altered in the last two years. In this list the leases were canceled for being issued (1) to other than the first qualified applicant; (2) for land in a prior oil and gas lease; (3) for lands in Indian reservations; (4) for lands patented

[9] This is the office in which the present case originated.

without reservation of oil and gas; (5) for lands in forest exchanges; (6) noncompetitively for lands in a known geologic structure; (7) for lands in a mineral entry; (8) for lands within a reservoir area; (9) for an area less in size than the minimum required by law; (10) where the offer to lease was withdrawn before the lease was issued; (11) through error in platting; (12) in conflict with a homestead entry; and (13) for other miscellaneous reasons.

It must be emphasized that the authority claimed is no broader than the necessities of practical administration. The Secretary claims no broad power to cancel any mineral lease for any cause. There is no suggestion of authority to forfeit leases validly issued because of subsequent violations by the lessee, except as expressly provided by statute.[10] The Secretary affirms only his responsibility to rescind leases *erroneously* granted, whether the error was fraudulently induced or resulted from inadvertence by his own subordinates. The claim, in short, is restricted to the correction of errors which affect the *initial validity* of the lease. Furthermore, for the purposes of this case, as we show below, it is necessary to establish only that a lease issued on a defective application can be cancelled by the Secretary upon the timely appeal of a competing applicant taken from the denial of his application.

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[10] As later noted, Section 31 of the Mineral Leasing Act of 1920, as amended in 1935 and 1946, permits administrative cancellation upon failure to comply with the lease conditions if the mineral value of the lease is still undetermined.

It is objected that the power of administrative cancellation, whatever it may have been with respect to "equitable" interests in land, such as homestead entries and the like, never survived the passing of "legal" title from the government to the private claimant, and certain land patent cases are cited in support of this proposition.[11] Accordingly, it becomes necessary to consider whether a mineral lease of the character here involved is governed, so far as the power of cancellation is concerned, by the "entry" cases or the "patent" cases.

At the outset, we submit that the real distinction drawn in the decisions of this Court is not between the passage of "legal" title and the conferring of an "equitable" interest. The true line is between a complete defeasance of title and a conveyance that transfers only a tentative, or limited or conditional right. So judged, the lease in suit plainly falls within the ambit of those cases which hold that the Secretary retains power to correct his own errors.

This is so not only because the interest transferred, being a mere lease, is something less than fee simple title. Beyond the limited nature of the interest conveyed, the lease granted under the Mineral Leasing Act is unusually restricted. Indeed, one of the objects of the new law, which replaced the old patent system, was to permit the United States to retain control over mineral lands after a lease was granted. As the House Committee on Public Lands noted in

[11] See cases cited at pp. 23–26 of Petitioner's Brief and p. 5, nn. 5 and 6 of the Brief for the Amici Curiae.

its report on the bill which became the Mineral Leasing Act of 1920 (H. Rep. 398, 66th Cong., 1st Sess., pp. 12–13):

> Deposits of oil and gas are now subject practically, to unlimited appropriaton under the placer-mining laws. The basic theory of all past conservation measures has been a leasing system of a limited area on payment of a royalty to the Government, thus reserving to the Government an owner's or less[or]'s interest in the property and reserving to it the right to prescribe rules and regulations against wasteful practices. * * *

The policy of retaining supervision over lands under lease, and over the leases themselves, is implemented in the statute. Thus, assignments and subleases must be approved by the Secretary. 30 U.S.C. 187. The Secretary, in the interest of conservation, may direct suspension of operations and production. 30 U.S.C. 209. The Secretary may require the lessee to operate under a cooperative or unit plan. 30 U.S.C. 226(e). In addition, 30 U.S.C. 189 authorizes the Secretary to prescribe necessary rules and regulations, and these further restrict the freedom of the lessee.

Under the regulations, the lessee may be compelled to drill or to pay compensatory royalty in the event of drainage. 43 C.F.R. 192.8. Cooperative or unit plans, as well as communitization and drilling agreements, are effective only when approved by the Secretary. 43 C.F.R. 192.20–192.23; 30 C.F.R. 226.8. The regulations also require the Secretary's approval of all transfers and assignments. 43 C.F.R. 192.40–

192.41. Finally, every detail of location, drilling and production is minutely regulated and the Secretary, through the Geological Survey, retains effective control over the lessee's operations from beginning to end. 30 C.F.R. Part 221.

The federal mineral lease very plainly does not give the lessee anything approaching the full ownership of a fee patentee; nor even does it convey an unencumbered estate in the minerals. Indeed, the government lessee acquires less than the homesteader whose entry is approved,[12] or the mining claimant whose location is perfected.[13] At all events, the issuance of a lease under

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[12] In *Orchard* v. *Alexander*, 157 U.S. 372, 383, it was said of a homestead entry:

> The party who makes proofs, which are accepted by the land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. * * * The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. * * *

[13] With reference to a mining claim, in *Wilbur* v. *Krushnic*, 280 U.S. 306, 316-317, the Court said:

> The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment * * *. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. * * *

the 1920 Act, unlike the granting of a patent, does not sever the government's connection with the land, or end its interest in the property affected. On the contrary, the Secretary retains control of both land and minerals, with the concomitant duty to supervise the administration of the parcel as a continuing portion of the public domain. It would seem to follow that, as continuing custodian of the public lands under lease and supervisor of the lease operations, he may, and in a proper case must, correct his own errors. *McKay* v. *Wahlenmaier,* 226 F. 2d 35, 40 (C.A.D.C.).

Recognition of the power to cancel leases does not license administrative abuses. Final action by the Department of the Interior has always been subject to judicial review. There is an appeal to the courts when the Secretary has acted beyond his authority. See, *e.g., Noble* v. *Union River Logging Railroad,* 147 U.S. 165. So also, when his decision is vitiated by fraud or misapplication of law. *Johnson* v. *Towsley,* 13 Wall. 72, 84; *Moore* v. *Robbins,* 96 U.S. 530, 535. But these are not the limits of judicial review. Today, at least, courts may, and do, inquire whether the administrative action is arbitrary, or capricious, or unsupported in the evidence. See, *e.g., Barash* v. *Seaton,* 256 F. 2d 714 (C.A.D.C.); *Seaton* v. *Texas Company,* 256 F. 2d 718 (C.A.D.C.); *Foster* v. *Seaton,* 271 F. 2d 836 (C.A.D.C.). The only condition is that court proceedings be initiated promptly. 30 U.S.C. (Supp. III) 226–2. There is accordingly no question of leaving the door open to high-handed or arbitrary cancellation.

B. THE MINERAL LEASING ACT OF 1920 DID NOT WITHDRAW THE SECRETARY'S PRE-EXISTING AUTHORITY TO REVIEW AND CORRECT ERRORS IN THE MANAGEMENT OF PUBLIC LAND

Petitioner contends that the Secretary's power to cancel grants affecting the public domain, whatever it may have been, was withdrawn, as respects oil and gas leases, by the Mineral Leasing Act of 1920. Except as expressly provided in the case of failure to comply with the terms of the lease before the mineral value of the land has been proved, he reads Section 31 of the Act as barring administrative cancellation and requiring judicial intervention. Petitioner's reliance on Section 31 is misplaced. That Section, and the other forfeiture and cancellation provisions of the statute, do not reach our question. They deal only with termination for breaches or violations occurring *after issuance,* not defects which invalidate initial issuance. The history, the text, and the practice relating to these provisions confirms our view.

The Mineral Leasing Act of 1920 was the belated Congressional response to growing alarm at the rapid depletion of petroleum reserves on the public domain. Public lands chiefly valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with the critical situation, the President issued a proclamation withdrawing from further entry 3,041,000 acres of land in California and Wyoming. The idea was to withhold these lands until Congress could pass legislation in aid of conservation of petroleum resources on public lands. The

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validity of the executive order was challenged and upheld by this Court in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, again as impliedly authorized by the public land general statutes and history.

In the meantime, Congress had begun to wrestle with the problem. In May of 1914, the Committee on Public Lands of the House of Representatives favorably reported a mineral leasing proposal. See House Report No. 668, 63d Cong., 2d Sess., on H.R. 16136. This bill passed both houses but died in conference in the adjournment rush at the close of the 63d Congress. The new mineral leasing program was considered by each subsequent Congress until the Mineral Leasing Act of 1920 was finally enacted in the Second Session of the 66th Congress.[14]

Several committee reports show that Congress was preoccupied with special problems which have no bearing on the present suit. There was for example, much opposition from Westerners to replacing the mineral patent with a lease, thus making the government a perpetual landlord for the public domain. See, *e.g.*, the minority report filed with Senate Report No. 319, 64th Cong., 1st Sess. There was bitter fighting over the compromise of suits and claims

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[14] H.R. 406, 64th Cong., H. Rep. No. 17, 64th Cong., 1st Sess.; S. Rep. No. 319, 64th Cong., 1st Sess.

S. 2812, 65th Cong.; S. Rep. No. 116, 65th Cong., 1st Sess.; H. Rep. No. 563, 65th Cong., 2d Sess.; H. Conf. Rep. No. 1059 and H. Rep. No. 1138, 65th Cong., 3d Sess.; H.R. 3232, 65th Cong.; H. Rep. No. 206, 65th Cong., 2d Sess.

S. 2775, 66th Cong.; H. Rep. No. 398, 66th Cong., 1st Sess.; H. Conf. Rep. No. 600, 66th Cong., 2d Sess. S. 2775 is the bill that was enacted.

similar to that involved in *United States* v. *Midwest Oil Co., supra.* See S. Rep. No. 116, 65th Cong., 1st Sess., p. 6. Fears were voiced about the large oil companies obtaining a monopoly of the petroleum resources on the public domain. See H. Rep. No. 206, 65th Cong., 2d Sess. But the dominant theme of the debates is conservation through control. See, *e.g.,* H. Rep. No. 398, 66th Cong., 1st Sess., pp. 12–13. Congress was concerned lest the placer patent system encourage too rapid mining of petroleum resources today that the government, particularly the Navy, might need tomorrow. H. Rep. No. 206, *supra.*

The legislative history of the Act leaves the overwhelming impression that Congress intended to increase, not limit, the Secretary's control over the mineral lands of the United States. The House Report on the bill previously quoted (*supra,* p. 16) so indicates. The Report on an earlier version of the proposal confirms this purpose:

> The legislation provided for herein, it is thought, will go a long way toward the development of the West and of the natural resources of the West and at the same time reserve to the Government the right to supervise, control, and regulate the same, and prevent monopoly and waste and other lax methods that have grown up in the administration of our public-land laws. [H. Rep. No. 1138, 65th Cong., 3d Sess., p. 19.]

Accordingly, it would be surprising to find in the Act a withdrawal of the Secretary's power to cancel

erroneously issued leases. In fact, nothing in the statute disturbs the pre-existing law on this question.

As originally enacted, the Mineral Leasing Act contained several provisions dealing with cancellation or forfeiture. But none of these affects our problem. Indeed, all but one of the forfeiture provisions deal exclusively with breaches of the lease terms or violations of the Act or regulations occurring *after* a valid lease has issued.

Thus, disregarding the prohibition against drilling within 200 feet of the lease or permit boundary is declared to be ground for forfeiture, "to be enforced in appropriate proceedings in courts of competent jurisdiction." Sec. 16, 41 Stat. at 443. Other grounds for judicial cancellation included failure to comply with the provision of the Act granting rights of way for pipe lines through public lands, Sec. 28, 41 Stat. at 449, and breach of the conditions of the lease. Sec. 31, 41 Stat. 450. On the other hand, failure to "exercise due diligence" in prospecting subjected a prospecting permit to administrative cancellation. Sec. 26, 41 Stat. at 448.

The only partial exception to the scheme of the Act is Section 27, 41 Stat. at 448, which provides for judicial forfeiture of interests in excess of the maximum acreage allowances. This provision responds to the congressional fear that the mineral wealth of the country might be monopolized in the hands of the large oil companies. But, even here, the Act is less concerned with initial invalidity than with conduct after issuance which requires forfeiture. Thus, the

provision does not focus on excessive original grants to any one person, but rather on subsequent acquisitions and combinations that would defeat the holding limitations. In any event, the difficult and close questions involved in disentangling the various schemes through which excessive acreage might be combined under the same control are totally unlike the simple determination whether an administrative error of the kind here in question has been made, and it is not difficult to understand that Congress thought those decisions should be confided to the judicial process.

Read against this background, Section 31 of the Act, here relied on, does not reach our question. As originally enacted, it provided:

> That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

In a sense, this is, of course, a "catch-all" provision. But it is not addressed to administrative errors or to invalid leases. It presumes a lease validly issued and prescribes cancellation, at the suit of the Secretary,

when "the lessee fails to comply" with his obligations as such, whether imposed by the Act itself, by the regulations promulgated thereunder, or by the lease.

The bits of legislative history cited by petitioner (Br. 14–17) and the amici curiae (Br. 6–7), and the Secretary's communication in 1916 (Pet. Br. 14), do no more than reiterate the rule of Section 31, that forfeiture of a lease validly issued for misconduct by the lessee must be judicially declared. No one in the debates was concerned with administrative errors and their correction by cancellation. That subject was simply not discussed.

The forfeiture provision applicable to "prospecting permits," the predecessor of the present non-competitive lease on unproved land,[15] illustrates the point. Indeed, as already noted, Section 26 of the original Act permitted administrative cancellation of permits for failure "to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit." 41 Stat. at 448. It says nothing about cancelling a permit erroneously issued. Yet no one ever doubted the authority of the Secretary administratively to annul

[15] It is worth noting that, under the scheme of the Act as originally enacted, the present lease would not have been a "lease" but rather a "prospecting permit," cancellable by administrative action. Secs. 13, 14, 17, 26; 41 Stat. at 441–442, 443, 448. When the Act was amended in 1935, 49 Stat. 674, 676, "prospecting permits" became "leases," still cancellable by administrative action for breach of the terms of the grant "until the land covered by any such lease is known to contain valuable deposits of oil or gas." 49 Stat. at 678; now incorporated in 30 U.S.C. 188.

a permit granted by mistake to the wrong applicant, or on land not open for lease. Nor would it be reasonable to suppose that Congress meant to allow the Secretary to judge a breach by the permittee, while denying power to correct his own mistakes, and those of his subordinates. The answer is, of course, that Section 26 does not deal with the correction of errors; that power already existed in the general statutes governing the Secretary of the Interior. The provision ignores the obvious and proceeds to define a new authority with respect to the cancellation of a permit for causes arising after its issuance. The same principle governs Section 31 and the other forfeiture provisions of the Act.

Thus, there is every indication that in providing for judicial cancellation, Congress was dealing with violations *by the lessee*, the purpose of the specific provisions being only to add to the existing grounds for forfeiture. There is nothing in the Act, or its legislative history, to suggest that Congress meant to erect a new rule requiring judicial intervention for the correction of administrative errors in the initial transaction. The plain fact is that Congress did not even advert to that procedure. The presumption is that it meant to leave things as they were in that respect, allowing the Department of the Interior to retain power to correct its own errors in the management of public land. If the statute affects the question at all, it is by confirming the Secretary's broad authority over the mineral lands of the government and his power to promulgate regulations for the ad-

ministration of the new leasing program. Sec. 32, 41 Stat. at 450, 30 U.S.C. 189.

The power to cancel for mistakes in the issuance of a lease has been exercised repeatedly during the past forty years.[16] The reported decision on review are confined to the Tenth and District of Columbia Circuits,[17] the former holding the Secretary without power to correct an error produced by fraud, once a lease has issued, *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649 (C.A. 10), certiorari denied, 366 U.S. 936,[18] the latter, after some vacillation,[19] reaching the opposite conclusion. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C.); *Boesche* v. *Udall*, 303 F. 2d 204 (C.A.D.C.) (this case).

C. THE ADMINISTRATIVE PRACTICE UNDER THE MINERAL LEASING ACT OF 1920 AND SUBSEQUENT AMENDMENTS CONFIRM THE AUTHORITY OF THE SECRETARY TO CANCEL LEASES ISSUED BY MISTAKE

As we have seen, nothing in the 1920 statute itself indicates a Congressional intent to limit the Secretary's general supervisory authority over the public domain.

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[16] See pp. 27–28, *infra*; Appendices B and C.

[17] A district court decision from the Ninth Circuit, *Call* v. *Richfield Oil Co.*, 101 F. Supp. 972 (S.D. Cal.), touches on the problem and seems to resolve it in favor of the Secretary.

[18] More recently, in *Henriques* v. *Gulf Oil Corp.*, 305 F. 2d 51, though it dismissed the case as moot, the Tenth Circuit indicates adherence to its earlier view.

[19] See *Bell Oil & Gas Co.* v. *Wilbur*, 50 F. 2d 1070 (C.A.D.C.), in which the court, in different circumstances, denied the Secretary's authority, and the original opinion (Pet. Br. 36–43), later withdrawn, in *Seaton* v. *Texas Company*, 256 F. 2d 718, 721 (C.A.D.C.).

The subsequent history of the Act only confirms this impression.

Almost from the inception of the mineral leasing program the Department of the Interior undertook to exercise, as to the Mineral Leasing Act, its general authority to correct errors. After noncompetitive leases replaced prospecting permits by virtue of the Act of August 21, 1935, 49 Stat. 674, the Department continued its prior course of action. The 19 published decisions and 47 unpublished decisions [19a] of the Secretary of the Interior between 1921 and 1961 listed in Appendices B and C of this brief indicate the consistent Interior policy of canceling permits [20] and leases where they had been issued by mistake, through fraud, or in violation of law.

The facts underlying those decisions vary widely. Some are close to the present case. See, *e.g., R. S. Prows,* 66 I.D. 19; *Charles D. Edmondson,* 61 I.D. 355, 365; *Iola Morrow,* A-27177 (October 10, 1955); *Alexander Leach* v. *Cornell,* A-1687 (August 13, 1921). Others are more remote, such as those involving fraud. See,

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[19a] Copies of these unpublished decisions have been filed with the Clerk and served on counsel for petitioner.

[20] Cancellation of *permits* for error or fraud is not to be distinguished from *lease* cancellations on the same grounds. As already noted, Section 26 of the original Act provided for administrative cancellation of permits only for breach of the conditions of the grant, just as Section 31 now does for non-competitive leases before the value of the land is proved. But neither provision adverts to cancellation for other causes; the Secretary's authority to cancel for error does not derive from the 1920 Act in either case. We must reject as mistaken the Secretary's occasional reliance on Section 26 in cancelling permits for causes not there specified. See *James Griffith Stephens,* M-14721 (January 27, 1926); *Wecolo Oil Company,* M-14722 (January 27, 1926).

e.g., Hill v. *Williams and Liddell,* 59 I.D. 370; *Antonio DiRocco et al.,* A–26434 (July 11, 1952). Yet they all illustrate the same underlying principle, that the erroneous issuance of a lease is an unauthorized act which must be promptly undone. See *Reay* v. *Lackie,* 60 I.D. 29; *Transco Gas & Oil Corp., et al.,* 61 I.D. 85. At all events, the fact is that the Secretary has, from the beginning, cancelled mineral leases issued by mistake in derogation of the rights of another applicant. *Alexander Leach* v. *Ernest Cornell,* A–1687 (August 13, 1921); *McCarthy* v. *Son,* A–2398 (March 4, 1922); *John A. Murray* v. *A. F. McNabb,* A–4412 (February 14, 1923); *Irvin C. Smith* v. *William R. Buttolph,* A–5129 (June 2, 1923). And that practice has been allowed to continue undisturbed.

More than a dozen times in forty years Congress has amended the Mineral Leasing Act of 1920 as it relates to oil and gas leases.[21] Yet, never once were the cancellation and forfeiture provisions changed to overturn the persisting practice of administratively cancelling permits and leases issued by mistake. The conclusion is plain that Congress did not view the Secretary's conduct as violative of the statute, or, at least, that it was content to leave matters as they were.

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[21] See Act of April 30, 1926, 44 Stat. 373; Act of July 3, 1930, 46 Stat. 1007; Act of March 4, 1931, 46 Stat. 1523; Act of Aug. 21, 1935, 49 Stat. 674; Act of Aug. 26, 1937, 50 Stat. 842; Act of Aug. 8, 1946, 60 Stat. 950; Act of June 1, 1948, 62 Stat. 285; Act of Sept. 1, 1949, 63 Stat. 682; Act of July 29, 1954, 68 Stat. 583; Act of Aug. 2, 1954, 68 Stat. 648; Act of Sept. 21, 1959, 73 Stat. 571; Act of Sept. 2, 1960, 74 Stat. 781.

Though none of the early amendments touch our question, two are perhaps worth mentioning. We have already noted that the Act of August 21, 1935, 49 Stat. 674, 676, converted "prospecting permits" on unknown geologic structures to "non-competitive leases," carrying over the provision for administrative cancellation for breach of the conditions of the grant before the land was proven. This was accomplished by adding a new paragraph to Section 17 of the Act, stipulating that such leases "shall be subject to cancelation by the Secretary of the Interior * * * upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas." 49 Stat. at p. 678. The legislative reports do not reveal anything pertinent here beyond the obvious fact that the system is being changed from permits to leases. S. Rep. No. 1158, H. Rep. No. 1747, and H. Conf. Rep. 1775, 74th Cong., 1st Sess.

The Act of August 8, 1946, 60 Stat. 950, transferred the above provision relating to cancellation of leases from Section 17, 30 U.S.C. 226, to Section 31, 30 U.S.C. 188. S. Rep. No. 1392, p. 3, 79th Cong., 2d Sess. The Senate Report explains the change as follows:

> Section 31 of the Mineral Leasing Act is amended to consolidate in that section various provisions of the act relating to termination or forfeiture of leases by default by the lessee, the substance of the existing law being retained in the amended section.

The 1946 Act also amended Section 27, 30 U.S.C. 184, which had provided that:

> Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General * * *.

The provision was changed to read:

> If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. * * *

The report of the Department of the Interior, which is printed in Senate Report No. 1392, *supra*, indicates the primary concern at the time was with the problem of forfeiture where the interest illegally owned or controlled represented only a fractional part of the lease. No change relevant to our problem was intended.

More in point is the history of an unsuccessful proposal considered by the Congress in connection with the amendment of the Mineral Leasing Act effected by the Act of September 2, 1960, 74 Stat. 781. During those debates, Congress was fully advised of the position of the Department of the Interior with respect to its authority to cancel oil or gas leases which had been issued through error or fraud, and, in deference

to the Department's protests, it expressly declined to change the Mineral Leasing Act to affect the administrative authority of the Secretary to cancel leases.

At the time, *Pan American Petroleum Corp.* v. *Pierson*, 181 F. Supp. 557 (D. Wyo.), reversed, 284 F. 2d 649 (C.A. 10), certiorari denied, 366 U.S. 936, a case involving the issue of the Secretary's authority to cancel by administrative action a lease procured by fraud, in violation of the acreage limitation of Section 27 of the Mineral Leasing Act, was pending in the courts. Against this background of controversy, several bills were introduced in the 86th Congress which either expressly, or by implication, would have seriously limited the administrative authority of the Secretary to cancel an oil and gas lease issued in error or by fraud. Among these was H.R. 10455. It would have amended Section 27 to provide expressly that "no lease, option or interest with respect to the acquisition or holding of which the Secretary alleges or charges the commission of fraud against the United States shall be canceled, forfeited, or ordered to be disposed of except in an appropriate proceeding instituted by the Attorney General in the United States District Court for the district in which the land, or some part of it, is located * * *" (Proposed Sec. 27(h)(2) as set out at pp. 24–25 of H. Rep. No. 1401, 86th Cong., 2d Sess.).

The Secretary protested very strongly against the attempt to limit his administrative authority to cancel leases. In his report to the House Committee, the

Secretary said (H. Rep. No. 1401, 86th Cong., 2d Sess., at p. 10):

> * * * subsection (h)(2) of section 27 as it would be amended by H.R. 10455 would deny the Secretary the right to cancel or forfeit a lease, option, or other interest in two situations: (1) where producing acreage or lands known to contain valuable deposits of oil or gas are concerned, or (2) where fraud against the United States is alleged in the acquisition or holding of that lease, option, or other interest. This is an important material change from the present law since the Secretary now has full authority to cancel leases, whether on producing or on nonproducing acreage, where fraud is proved in their acquisition. The present prohibition on the administrative cancellation of leases where producing acreage is involved (30 U.S.C. 188) is limited to leases which have been lawfully issued. * * *

A similar protest was filed against the Senate version of the bill. See S. Rep. No. 1549, 86th Cong., 2d Sess., p. 22.

Congress retreated. The limiting amendment was abandoned. House Report No. 1401, p. 15, indicates the congressional attitude:

> The committee gave careful consideration, as requested in the Department's report, to the provisions of subsection (h)(2) of section 27 as it would be amended by H.R. 10455 as introduced. Since the committee adopted an amendment which reverts to the present language of the Mineral Leasing Act on the point involved, it did not adopt the clarifying amend-

> ment to the language of the bill as introduced recommended by the Department. H.R. 10455, as amended, thus does not interfere with the exercise of whatever supervisory powers the Secretary of the Interior may now have over proceedings arising from the act. As noted before in this report, the extent of these powers is now in litigation.

Earlier, at page 7 of the report, the Committee had said:

> The committee recognizes that the meaning of this language is under current dispute. The plaintiffs in certain cases pending or recently pending in the U.S. District Court for the District of Wyoming have questioned the asserted authority of the Secretary of the Interior to cancel or forfeit oil and gas leases in an administrative proceeding. The committee believes that any legislation further fixing jurisdictional boundaries in this field between the judiciary and the executive should await the outcome of, and be based upon the experience gained through, the pending actions.

The upshot is that, though fully apprized of the Secretary's long-standing practice, Congress chose not to interfere. Whether or not ratification of the administrative practice can be inferred (see *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Billings* v. *Truesdell*, 321 U.S. 542, 552–553; *Brooks* v. *Dewar*, 313 U.S. 354; *United States* v. *Kennedy*, 278 F. 2d 121, 126 (C.A. 9)), Congress has at least indicated continuing acquiescence in the executive construction,

which justifies the Secretary in following the same practice until the authority is revoked. *Sioux Tribe* v. *United States*, 316 U.S. 317, 326; *United States* v. *Jackson*, 280 U.S. 183, 197; *United States* v. *Midwest Oil Co.*, 236 U.S. 459.

D. THE ADMINISTRATIVE POWER TO CANCEL A LEASE ISSUED BY MISTAKE, UPON APPEAL FROM THE SUBSEQUENT DENIAL OF A CONFLICTING APPLICANT, IS NECESSARY TO SECURE THE RIGHTS OF COMPETING APPLICANTS

As we have seen, the Secretary's power to cancel leases is essential to protect the public interest in the administration of the public domain. Thus, here, the correction gives effect to regulations designed to check the undue splitting up of tracts which would facilitate frauds, hinder the development of oil and gas resources and render supervision very burdensome.[22]

[22] The policy behind the rule is explained in *Annie Dell Wheatley*, 62 I.D. 292, at 293–294:

> The Secretary has found that the filing of offers for oil and gas leases without a minimum limitation as to acreage often leads to abuses as far as the general public is concerned, to administrative difficulties, and to the hindrance of the proper development of the oil and gas resources of the public domain. It was to protect the public from such abuses, all of which are well known to the oil industry, to lessen the administrative burden, and to remove impediments to the proper development of public lands that the regulation was adopted. As the intervener recognizes, the regulation was adopted as the result of widespread advertising by promoters that members of the public could secure 40-acre oil and gas leases for sums ranging from $50 to $100 or more. The filing fee and first year's rental on a 40-acre lease amounted to only $30. Oil and gas filings increased as much as 42 to 60 percent in some land offices as a result of the advertising. The

In addition, where, as in this case, the statutory rights of others are involved; the administrative power to correct erroneous awards serves a second purpose: it permits justice to be done between private claimants.

Under Section 17 of the Mineral Leasing Act (30 U.S.C. 226) "the person first making application for the lease who is qualified to hold a lease under [the statute] shall be entitled to a lease of such lands without competitive billing." In the case of desirable lands this is an important right, which the Department uses care to protect. If a lease is erroneously issued to one who is not qualified, or on a defective application, the first qualified applicant is in danger of losing his statutory priority. Ideally, perhaps, mistakes should be corrected *before* a lease is issued. Actually, if the right of the first qualified applicant is to be effective, the Department must have an administrative power of re-

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result was a slow down in the processing of applications not induced by the advertising, with the prospect of even greater delays as the 40-acre filings mushroomed. Moreover, as the issuance of 40-acre leases increased, so would the difficulties of an operator attempting to assemble acreage for development purposes increase. Instead of contacting one lessee for a section of land an operator might have to deal with 16 lessees scattered over the United States. The difficulties of attempting to assemble a large block of acreage under these conditions would be enormous, and would definitely impede the development of the public lands. Furthermore, not only did the 40-acre filings cause a substantial administrative burden in processing the filings but it could be anticipated that in the future, with most of the lessees being pure speculators, there would be defaults in rentals leading to substantial administrative work in attempting to clear up lease accounts and records.

vision to correct erroneous awards in derogation of that right.

In the absence of some special arrangement a local land office takes up the applications on file in chronological sequence and disposes of each. It would be virtually impossible to try to hold a formal hearing upon each of thousands of applications, giving conflicting claimants notice and the opportunity to be heard and to appeal. The manager of the local office or an assistant acts upon each application in turn. If the land is available, if the applicant is qualified, and if the application appears to conform to the regulations, a lease will issue. In due course the manager will come to each conflicting application for the same tract that was filed before the lease was issued. He may realize his own mistake. More likely, he will find that the second applicant was not the first qualified applicant and will, therefore, deny the application. The notice of denial may give the applicant his first occasion to investigate whether he was in truth the first qualified applicant, and to appeal on this ground to the Director of the Bureau of Land Management and the Secretary of the Interior. Thus, given the nature of the land office's business, the existence of some power of cancellation, at least while timely conflicting applications are pending, is essential to secure the rights of competing applicants. The importance of this consideration is shown by the fact that in practice the Secretary has not used his power to cancel where the irregularity is minor unless necessary, as in the present case, to prevent prejudice to a com-

peting applicant whose application was on file before the lease was erroneously issued. Cf. 43 C.F.R. (1962 Supp.) 221.10.

In the present case, for example, Cuccia and Conley had a conflicting application pending at the same time as petitioner's. Petitioner's application was defective, although it was filed first. When the local manager overlooked the defect and erroneously approved petitioner's application he had not yet come to the conflicting application of Cuccia and Conley. Their first knowledge that their application would be unsuccessful appears to have come when they subsequently received word that it had been denied; certainly this was the first administrative notification. For the Secretary to have refused to correct the earlier error on the ground that a lease had already issued would have resulted in defeating the prior right of Cuccia and Conley as the first qualified applicant. Only by recognition of the power to cancel could that right be effectively preserved.

E. THE EFFECT OF THE DEPARTMENT'S PROCEDURAL REGULATIONS, AS ADMINISTERED, IS TO MAKE THE ISSUANCE OF A LEASE SUBJECT TO REVIEW, AS UPON APPEAL TO A HIGHER OFFICIAL, UNTIL THE DEPARTMENT HAS RULED UPON ALL CONFLICTING APPLICATIONS FILED BEFORE THE LEASE WAS ISSUED

The regulations of the Department of the Interior and the prevailing practice recognize the foregoing practicalities. The published rules of practice, 43 C.F.R. (1962 Supp.), Part 221, expressly provide that anyone "adversely affected by a decision of [a subordinate] officer of the Bureau of Land Management

* * * shall have a right of appeal to the Director [of the Bureau]", § 221.1. The right must be exercised within 30 days of receipt of the decision complained of. § 221.2. And a further appeal from the Director to the Secretary is provided to the dissatisfied party, § 221.31, again subject to the same time limitations. § 221.32. The application of these provisions in contesting a lease award is illustrated by the history of this case. As already noted, shortly after the grant to petitioner, Cuccia and Conley, the second applicants, were notified by the local land office that their offer was rejected because of petitioner's prior offer. They were specifically advised of their right to appeal and, within the time prescribed, they appealed from the decision to the Director of the Bureau of Land Management. When the Director rendered his decision, reversing the local land Manager and ordering cancellation of the initial lease award, it was petitioner's turn to appeal to the Secretary, as he did. Only then was the administrative action in any sense final. See § 221.37.

The review provisions of the regulations and their availability to a rejected applicant would seem to make it plain that the initial award of a lease is merely tentative. Since an appeal is allowed to the unsuccessful party, the award, quite obviously, is made subject to the determination on review. Certainly, the mere fact that the lease has issued before the ultimate decision is rendered does not foreclose the argument that the Secretary's action is an exercise of the appellate power. The judicial analogue sug-

gests itself. The Secretary of the Interior no more loses jurisdiction over the decision of his subordinate which has gone into effect than does an appellate court over a judgment which has been paid, provided, in both cases, that a timely appeal has been lodged.

There is, of course, no doubt of the Secretary's right to prescribe a system of internal review for the correction of errors committed by his subordinates. As head of an executive department, the Secretary has plenary authority to promulgate regulations "for the government of his department" 5 U.S.C. 22; see also, 43 U.S.C. 1201. Certainly, this includes the power to provide for administrative appeals within the agency. Nothing is more common. See Davis, *Administrative Law*, § 8.18. And, in the Department of the Interior, review procedures with reference to grants in the public domain have been in effect since at least 1836. See *Barnard's Heirs* v. *Ashley's Heirs*, 18 How. 43, 44–45; *Johnson* v. *Towsley*, 13 Wall. 72, 81–83.

Nor is there any defect in the appellate procedure actually adopted by the Department. Whenever another party is affected by the decision, the proceedings are adversary. Cf. *Civil Aero. Bd.* v. *Delta Air Lines*, 367 U.S. 316. The appellant is required to notify his opponent, 43 C.F.R. (1962 Supp.) 221.4, 221.34, and the latter has full rights of participation. *Id.*, §§ 221.5–221.6, 221.35.

It is said, however, that the system works unfairly in the present context because the appeal is filed and decided after the lease has already issued. The claim

is that the grantee is entitled to view the delivery of the instrument as the final action of the Department. Yet, if we correctly read the regulations, it is difficult to see how the successful applicant is misled. Knowing that every subsequent applicant who filed before the lease was issued will have a right to appeal from the rejection of his offer, and that in those proceedings the competing claimant is permitted to contest the initial award, the grantee is on notice that he holds by a precarious title until the times for appeal have expired, or the appeals have failed.

It can, of course, be debated whether the ideal practice might not be to withhold issuance of the lease until final disposition of any appeals. As we have shown, that is normally impractical. But, in any event, it is peculiarly a question of internal procedure to be resolved by the Secretary. See 43 C.F.R. (1962 Supp.) 221.101. The Secretary has, in turn, made a discriminating judgment as to where the balance of convenience lies in differing contexts. Thus, in cases where the manager has rejected a *prior* application (either prior in time or one which claims a statutory preference) and proposes to grant a subsequent one, the regulations direct that issuance of the lease to the subsequent applicant be withheld until final disposition of the prior applicants' claims. 43 C.F.R. 192.42(m). In such a case, the prior claims are, in effect, accorded a presumptive validity that warrants suspension of further action until they are finally resolved. On the other hand, where the manager proposes to grant the earlier-filed ap-

plication, the regulations do *not* require that the issuance of the lease be delayed against the possibility that a later applicant may assert a defect in that application and take an appeal. There, the presumptive validity of the earlier-filed application, confirmed by the manager's initial decision, cuts the other way, and the likelihood that a subsequent applicant will be able successfully to challenge the prior application is not deemed sufficiently substantial to warrant postponement of the issuance of the lease—a presumption that has been confirmed in practice by the infrequency of successful challenges by later-filing applicants.[23] That accommodation of the competing interests—balancing the desirability of not taking action which might have to be undone against the desire to avoid needless delays in issuing leases—involves considerations not unlike those which counsel courts to grant or deny stays of judgments pending appeal. And, like the judicial analogue, whether the action should be stayed or not is a question only of the sound exercise of discretion. The Secretary's appel-

[23] There is an informal practice, not embodied in the regulations, of withholding issuance of the lease even in that context if, before the prior application has been acted upon, a subsequent applicant has brought to the manager's attention an alleged defect in the application and protested its grant. In such a case, the likelihood of a serious contest over the grant is deemed real enough to justify postponement of the issuance of the lease pending its resolution. Since, however, that procedure is not prescribed by regulations, Cuccia and Conley, the competing applicants in this case, can hardly be bound by it or have their rights foreclosed by their failure to "protest" the award to petitioner prior to the issuance of the lease.

late procedure is not defective merely because it does not always require suspension of the challenged decision pending review.

We do not suggest that the Secretary has formally conceived the practice of cancellation upon appeal by a competing applicant as a species of appellate review. Nor do we stand only upon such narrow ground. The power of the Secretary, subject to appropriate judicial review, to cancel leases for mistakes in their issuance is, as we have shown, well established both by practice and in the law governing the management of the public domain. Were it necessary, however, the cancellation *in this case* should be upheld as appellate action taken before the decision to award the lease to petitioner had become "final" under the departmental practice pursuant to published regulations.

CONCLUSION

The judgment of the court of appeals is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 485, formerly R.S. § 441:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 4. Bureau of Land Management.
>
> * * * * *
>
> 13. Public lands, including mines.

43 U.S.C. 2, formerly R.S. § 453:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. 1201, formerly R.S. § 2478:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Section 31 of the Mineral Leasing of 1920, as amended, 30 U.S.C. 188:

> Except as otherwise herein provided, any lease issued under the provisions of sections 181–184, 185–188, 189–192, 193, 194, 201, 202–209, 211–214, 223, 224–226, 226d–229a, 241, 251,

and 261–263 of this title may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of said sections, of the lease, or of the general regulations promulgated under said sections and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land. Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made.

43 C.F.R. 192.42(d):

> * * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:
>
> (1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.
>
> (2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment.

43 C.F.R. 192.42(g)(1):

> Except as provided in subparagraph (2) of this paragraph, an offer will be rejected and returned to the offeror and will afford the applicant no priority if:
>
> * * * * *
>
> (ii) The total acreage * * * is less than 640 acres or the equivalent of a section and is not within the exceptions of paragraph (d) of this section.

43 C.F.R. 192.42(m):

> No lease shall be issued before final action has been taken on (1) any prior offer to lease the land, (2) any subsequent offer to lease the land that is based upon an alleged preferential right, and (3) any petition for the renewal or reinstatement of an existing or former lease on the land. If a lease is issued before final action has been taken on such an offer or petition,

it shall be canceled, after due notice to the lessee, if the offeror or petitioner is found to be qualified and entitled to receive a lease on the land.

43 C.F.R. (1962 Supp.) 221.1:

> Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management other than the Director or persons signing for the Director, shall have a right of appeal to the Director.

43 C.F.R. (1962 Supp.) 221.2(a):

> A person who wishes to appeal to the Director must file in the office of the officer who made the decision (not the office of the Director) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

43 C.F.R. (1962 Supp.) 221.4:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 221.95, not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 221.98. Proof of such service as required by § 221.95 must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) within 15 days after service unless filed with the notice of appeal.

43 C.F.R. (1962 Supp.) 221.5:

> If any party served with a notice of appeal wishes to participate in the proceeding on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. If additional reasons, written arguments, or briefs are filed by the appellant, the adverse party shall have 30 days after service thereof on him within which to answer them. The answer must state the reasons why the anwerer thinks the appeal should not be sustained. Answers must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) and must be served on the appellant, in the manner prescribed in § 221.95, not later than 15 days thereafter. Proof of such service, as required by § 221.95, must be filed in the office of the Director (see address above) within 15 days after service. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in § 221.92.

43 C.F.R. (1962 Supp.) 221.6:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to a Field Commissioner of the Bureau of Land Management for such a hearing. Such a request must be made in writing and filed with the Director within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Director, and the Director may, on his own motion, refer any case to a Field Commissioner for a hearing on an issue of fact. If a hearing is ordered, the Director will

specify the issues upon which the hearing is to be held.

43 C.F.R. (1962 Supp.) 221.9:

> The Director will render a written decision in each case appealed to him. Such decisions will be served on all parties and shall be subject to an appeal to the Secretary as provided in § 221.31.

43 C.F.R. (1962 Supp.) 221.31:

> Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the party adversely affected shall have failed to appeal from the decision of such official.

43 C.F.R. (1962 Supp.) 221.32(a):

> A person who wishes to appeal to the Secretary must file in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the Director's office within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

43 C.F.R. (1962 Supp.) 221.34:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, writ-

ten arguments or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 221.95, not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 221.98. Proof of such service as required by § 221.95 must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) within 15 days after service unless filed with the notice of appeal.

43 C.F.R. (1962 Supp.) 221.35:

If any party served with a notice of appeal wishes to participate in the proceeding on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. If additional reasons, written arguments, or briefs are filed by the appellant, the adverse party shall have 30 days after service thereof on him within which to answer them. The answer must state the reasons why the answerer thinks the appeal should not be sustained. Answers must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) and must be served on the appellant, in the manner prescribed in § 221.95, not later than 15 days thereafter. Proof of such service, as required by § 221.95, must be filed in the office of the Secretary (see address above) within 15 days after service. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in § 221.92.

43 C.F.R. (1962 Supp.) 221.37:

No appeal will lie in the Department from a decision of the Secretary.

APPENDIX B

PUBLISHED DECISIONS OF THE SECRETARY OF THE INTERIOR CANCELLING OIL AND GAS LEASES AND PERMITS ISSUED UNDER THE MINERAL LEASING ACT OF 1920 FOR MISTAKE, INADVERTENCE, FRAUD, OR OTHER REASONS ARISING PRIOR TO THEIR ISSUANCE

1. *J. Penrod Toles*, 68 I.D. 285 (1961).
2. *Waring Bradley, James M. Snowden*, 67 I.D. 241 (1960).
3. *Lynn Nelson, Uranium King Corporation*, 66 I.D. 14 (1959).
4. *R. S. Prows*, 66 I.D. 19 (1959).
5. *L. E. Grammer*, 66 I.D. 201 (1959).
6. *Malcolm C. Petrie*, 66 I.D. 288 (1959).
7. *Duncan Miller, Louise Cuccia*, 66 I.D. 388 (1959).
8. *Marion F. Jensen et al., Elden F. Keith et al.*, 63 I.D. 71 (1956).
9. *R. B. Whitaker et al.*, 63 I.D. 124 (1956).
10. *Arnold R. Gilbert*, 63 I.D. 328 (1956).
11. *B. E. Van Arsdale*, 62 I.D. 475 (1955).
12. *The Texas Company et al.*, 61 I.D. 367 (1954).
13. *Charles D. Edmonson et al.*, 61 I.D. 355 (1954).
14. *Transco Gas & Oil Corp. et al.*, 61 I.D. 85 (1952).
15. *Bettie H. Reid et al.*, 61 I.D. 1 (1952).
16. *Sidney J. Armstrong, G. C. Dunford*, 60 I.D. 425 (1950).
17. *Reay* v. *Lackie*, 60 I.D. 29 (1947).
18. *Hill* v. *Williams and Liddell*, 59 I.D. 370 (1947).
19. *Moon* v. *Woodrow*, 51 I.D. 118 (1925).

APPENDIX C

Representative Group of Unpublished Decisions of the Secretary of the Interior During Period 1921–1961 Canceling Oil and Gas Leases and Permits Issued Under the Mineral Leasing Act of 1920 for Mistake, Inadvertence, Fraud, or Other Reason Arising Prior to Their Issuance

1. *West Central Corporation*, A–28523 (February 2, 1961). Oil and gas lease, Anchorage 032625, cancelled because the lease was issued on the basis of a defective offer in violation of the statutory preference right of the first qualified applicant for the land.

2. *Gaylord O. Mickelson*, A–27952 (Supp.) (September 26, 1960). Oil and gas leases Colorado 017773 and 017776 cancelled in their entirety and Colorado 017777 cancelled in part as having issued for lands included in outstanding oil and gas leases.

3. *Andreas J. Wikan*, A–28356 (July 18, 1960). Oil and gas lease Anchorage 033656, cancelled in part to the extent of conflict with a prior lease.

4. *E. B. Todhunter, Victoria L. Cuccia*, A–28197 May 23, 1960). Oil and gas lease New Mexico 011398, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

5. *Albert Stevenson, Alexander S. Dunham*, A–27953 (June 30, 1959). Oil and gas lease Anchorage 036150, cancelled as having issued pursuant to a defective offer in violation of the statutory preference right of the first qualified applicant for the land.

6. *Eugenia Bate, et al.*, A–27861 (March 3, 1959). Oil and gas lease New Mexico 023799, cancelled as

having issued in violation of the statutory preference right of the first qualified applicant for the land.

7. *Union Oil Company of California* v. *Western Drilling and Producing Co. et al.*, A–27588 (July 14, 1958). Oil and gas leases Los Angeles 037880–B and Los Angeles 056758, cancelled to the extent of conflict with valid mining claims located on the land.

8. *John E. Miles*, A–27577 (June 12, 1958). Oil and gas lease New Mexico 018377, cancelled as having issued on land owned by the State of New Mexico.

9. *Iola Morrow*, A–27177 (October 10, 1955). Oil and gas lease Anchorage 028225, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

10. *R. L. Grady*, A–26903 (August 31, 1954). Oil and gas lease BLM–A 021645, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

11. *Ethel T. Morgan, Katherine T. Meagher*, A–26962 (May 25, 1954). Oil and gas lease Utah 04260, cancelled as having issued in violation of the preference right granted to another by section 29 of the Mineral Leasing Act.

12. *Eugene Robert Massow*, A–26524 (December 8, 1952). Oil and gas lease Los Angeles 081612, cancelled because after the offer was filed the land was withdrawn by the Secretary of the Interior for the use of the Air Force.

13. *Wm. Wostenberg*, A–26450 (September 5, 1952). Noncompetitive oil and gas lease, Wyoming 04552, cancelled in part for having issued on land known to be situated within the known geological structure of a producing oil well before the lease offer was filed.

14. *Antonio DiRocco et al.*, A–26434 (July 11, 1952). Oil and gas leases Salt Lake City 01975–

01980, incl., 01982, 02002, 02884–02886, incl., 02346, 02369–02371, incl., cancelled because the leases were fraudulently obtained.

15. *L. N. Hagood,* A–26226 (October 5, 1951). Oil and gas lease Sacramento 037518, cancelled because issued on land covered by an outstanding lease.

16. *J. U. Falke,* A–25871 (August 16, 1950). Oil and gas lease Las Cruces 065350, cancelled in part as to the conflict with a desert land entry on which final certificate had issued with no reservation of oil and gas to the United States.

17. *Davidson Hill,* A–25673 (July 22, 1949). Oil and gas lease Pueblo 059025, cancelled in part as to land which had previously been patented without a reservation of the oil and gas deposits to the United States.

18. *Marie J. Anderson,* A–24663 (August 12, 1947). Oil and gas lease Santa Fe 077542, cancelled because the land had previously been withdrawn by a departmental order.

19. *Roy M. Myers* v. *Carl VanWy,* A–21232 (April 5, 1938). Oil and gas prospecting permit Sacramento 021217, cancelled when it was discovered that there were two outstanding permits on the same land. Motion for rehearing denied, A–21232 (April 17, 1939).

20. *Fenelon Boesche,* A–21230 (February 21, 1938). Oil and gas lease GLO 06274, cancelled as the Government had no title or interest in the land when the lease issued.

21. *Glen G. Jones,* A–21016 (August 30, 1937). Oil and gas prospecting permit Pueblo 056311, cancelled in part because the permit was issued on land covered by a reservoir site.

22. *Joseph Francis Marias,* A–20952 (August 17, 1937). Oil and gas prospecting permit, Sacramento

027373, cancelled because the United States had no right or interest in the land.

23. *John W. Flint,* A–20506 (December 31, 1936). Oil and gas prospecting permit Los Angeles 051973, cancelled in part as having issued on land covered by a homestead entry upon which final proof had been filed and was without oil or gas reservation.

24. *Robert Hawxhurst, Jr.,* A–17613 (November 11, 1933). Oil and gas permit Sacramento 027179, cancelled because it issued on land which was within one mile of a naval petroleum reserve and this land had been withdrawn by the Secretary of the Interior from oil and gas prospecting. Motion for rehearing denied A–17613 (March 15, 1934).

25. *Frank Drake et al.* v. *North K. Simmons,* A–16885 (October 28, 1932). Oil and gas permit, Cheyenne 044173, cancelled in part because when it was reinstated it conflicted in part with an outstanding oil and gas permit.

26. *H. P. Saunders* v. *James T. Norman,* A–14464 (March 3, 1930). Oil and gas permit Las Cruces 027575, cancelled in part for having issued on land covered by a homestead entry on which final proof had been filed and was without a reservation of oil and gas to the United States.

27. *H. L. Pankurst* v. *Winfred J. May,* A–14248 (November 14, 1929). Oil and gas permit Las Cruces 032591, cancelled in part as to land which had previously been patented without a reservation of the oil and gas to the United States.

28. *F. O. Darby* v. *State of Louisiana,* A–12177 (February 21, 1929). Oil and gas permit Baton Rouge 011418, cancelled because the land was determined to be within the purview of the swamp-land grants of March 2, 1849 (9 Stat. 352) and September 28, 1850 (9 Stat. 519).

29. *Roy Whitten, M. B. Stevens,* A–11980 (January 30, 1929). Oil and gas permit Las Cruces 030556, cancelled as having issued on land in a homestead entry on which a patent was to issue without a reservation of oil and gas to the United States. Motion for rehearing denied, A–11980 (August 21, 1929).

30. *Charles E. Mills* v. *Leroy C. Gould, United States, Intervener,* A–11895 (September 5, 1928). Oil and gas permit, Los Angeles 041179, cancelled in part by reason of conflict with valid placer mining claims.

31. *Jacob Tornes,* A–11767 (July 3, 1928). Oil and gas permit Cheyenne 045173, cancelled in part because the land involved was not of a sufficient width to permit of drilling thereon in accordance with the provisions of section 16 of the Mineral Leasing Act. Petition for supervisory authority denied, A–11767 (October 27, 1928).

32. *Christina J. Ashe* v. *Clarence Dunn Hyde,* A–9587 (August 13, 1926). Oil and gas permit Visalia 014757, cancelled as having issued in violation of the preference right of another to a permit under section 20 of the Mineral Leasing Act.

33. *Wecolo Oil Company, Assignee of Valdo F. Wilson,* M–14722 (January 27, 1926). Oil and gas permit Denver 028815, cancelled on account of conflict with a grant of a right-of-way for a reservoir under the act of March 3, 1891 (26 Stat. 1095, 1101).

34. *James Griffith Stephens,* M–14721 (January 27, 1926). Oil and gas permit Denver 028587, cancelled on account of conflict with a grant of a right-of-way for a reservoir under the act of March 3, 1891 (26 Stat. 1095).

35. *C. B. Callahan, assignee of Ernest U. Schroeter,* A–8095 (July 31, 1925). Oil and gas permit Visalia

09213, cancelled in part as to land within one-mile of Naval Petroleum Reserve No. 1 which had been withdrawn by departmental order from oil and gas prospecting.

36. *Toribie Martinez* v. *Jay Turley*, A–7995 (June 10, 1925). Oil and gas permit Santa Fe 047818, cancelled in part as having issued on land covered by a settlement claim upon which an application for entry under the enlarged homestead act had been filed and the land was classified as being without prospective value for oil and gas.

37. *Bethlehem Exploration Interests, assignee* v. *Mary P. Dempsey*, A–6085 (February 19, 1924). Oil and gas permit Salt Lake City 032209, cancelled as having issued in violation of the rights of a prior applicant.

38. *Bertha M. Rosseau et al.* v. *Western Oil and Gas Co.*, A–5421 (August 2, 1923). Oil and gas permit Lander 011791, cancelled in part as to conflict with a valid mining claim upon which application for patent had been filed.

39. *Irvin C. Smith* v. *William Buttolph*, A–5129 (June 2, 1923). Oil and gas permit Glasgow 057420, cancelled because in conflict with an application by one entitled to a preference right to a permit under section 20 of the Mineral Leasing Act.

40. *Emil H. Selbach*, A–4318 (March 19, 1923). Oil and gas permit Evanston 08136, cancelled for land which State of Wyoming had applied for a patent to under the so-called Carey Act of August 18, 1894 (28 Stat. 372, 422) and the patent was to issue to the State without a reservation of oil and gas to the United States.

41. *John A. Murray* v. *A. F. McNabb*, A–4412 (February 14, 1923). Oil and gas permit Douglas

027144, cancelled as having issued in violation of the rights of another applicant who was entitled under section 13 of the Mineral Leasing Act to a preference right to a permit.

42. *Kretni Development Co.* v. *Benjamin J. Noland,* A–4358 (February 10, 1923). Oil and gas permit, Cheyenne 029918, cancelled as having issued on land covered by a valid placer mining claim.

43. *Charles A. Stewart,* A–4102 (November 14, 1922). Oil and gas permit Newcastle 025259, cancelled in part as to land which was included in a prior permit.

44. *Luther E. Pyle,* A–3078 (May 6, 1922). Oil and gas permit Newcastle 026246, cancelled in part as to conflict with homestead entries which were without reservations of oil and gas to the United States.

45. *Joseph R. McCarthy* v. *Charles A. Son,* A–2398 (March 4, 1922). Oil and gas permit Los Angeles 032836, cancelled as having issued in violation of rights of a prior applicant for the land.

46. *Joseph S. Glass,* A–2124 (February 10, 1922). Oil and gas permit Salt Lake City 026293, cancelled in part as to land for which the applicant did not intend to apply for.

47. *Alexander Leach v. Ernest Cornell,* A–1687 (August 13, 1921). Oil and gas permit Miles City 048833, cancelled in part as to land upon which an entryman had filed a preference right application for a permit under section 20 of the Mineral Leasing Act.

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REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, Administrator of the Estate of F.W.C. BOESCHE, Deceased,
Petitioner

v.

STEWART L. UDALL, Secretary of the Interior,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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In his brief the Secretary of the Interior asserts that he has the administrative power to cancel a lease independently of the Mineral Leasing Act (Sec. Br., p. 9). The Secretary implies this authority from Section 441 of the Revised Statutes of 1875, 5 U.S.C. 485 which charges the Secretary of the Interior with the supervision of public business relating to the public land, including mines; from Section 2478 of the Revised Statutes 43 U.S.C. 1201 authorizing the Secretary to "enforce and carry into execution by appropriate regulations, every part of the provisions of * * * (the title dealing with the

public lands) not otherwise provided for.", and from a number of decisions of this court which he cites. (Sec. Br., pp. 10, 11, 12).

Because of the heavy reliance of the Secretary on the cases cited by him, let us examine them to determine whether or not they support the Secretary's asserted authority to cancel leases. A careful reading of these cases will reveal that this court sustained the Secretary's authority to determine whether mining claims were mineral in character prior to issuance of a patent, *Best* v. *Humboldt Placer Mining Co.*, No. 52, this term, decided January 14, 1963, *Cameron* v. *United States*, 252 U.S. 450 (1920); to cancel a fraudulent preemption entry prior to issuance of patent; *Harkness & Wife* v. *Underhill*, 1 Black 316, 66 U.S. 316 (1861); *Orchard* v. *Alexander*, 157 U.S. 372 (1894); to cancel a homestead entry prior to issuance of patent; *Lee* v. *Johnson*, 116 U.S. 48 (1885); to revise a selection list previously approved by the Surveyor General and Commissioner of the General Land Office where no patent had issued; *Knight* v. *United States Land Association*, 142 U.S. 161 (1891); to annul a fraudulent timber land entry where no patent had issued; *Hawley* v. *Diller*, 178 U.S. 476 (1900); to reject a lieu land selection where no patent had issued; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316 (1902).

It is obvious from the foregoing that these cases cited by the Secretary provide no support whatever for his asserted implied authority to cancel leases administratively. On the contrary, the lines of jurisdictional demarcation between the Secretary and the judiciary established by this court in the above-cited cases and the "patent" cases cited and reviewed on pages 23-26 of petitioner's main brief, clearly prohibit Secretarial cancellation of a lease which has been issued

Thus, in *Hawley* .. *Diller*, 178 U.S. 476, 490, this court stated:

> "* * * the Land Department has control over disposition of the public lands until patent has been issued therefor and accepted by the patentee * * *"

and in *Brown* v. *Hitchcock*, 173 U.S. 473, 478 this court said:

> "But what we do affirm and reiterate is that power vested in the Department to determine all questions of equities, right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when legal title has passed from the government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on."
>
> "Of course, if the land officers are induced by false proof to issue a patent for mineral leases . . . or if they issue such a patent fraudulently or through a mere inadvertance, a bill in equity, on the part of the government, will be to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him. * * *"

Moreover, in expressing the view that after title had passed from the government, and the question became a matter of private right requiring the judgment of a court, this court emphasized that the ends of justice would thus be best served when it stated in *Johnson* v. *Towsley*, 80 U.S. 72, 87:

> "And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and a sound administration of the law."

The Secretary in his brief attempts to blunt the applicability to leases of the principles pronounced by the

"patent" cases, by disparaging the oil and gas lease when he states at pps. 17 and 18 of his brief:

> "The federal mineral lease very plainly does not give the lessee anything approaching the full ownership of a fee patent . . . At all events, the issuance of a lease under the 1920 Act, unlike the granting of a patent, does not sever the government's connection with the land, or end its interest in the property affected."

The Secretary's assertion in this regard is without merit and contrary to the Mineral Leasing Act and the terms of the lease itself.

Section 17 of the Mineral Leasing Act, as amended, (30 U.S.C. 223) provides in pertinent part:

> "Leases issued under this section shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities."

The lease issued to petitioner, and in fact all leases issued by the Land Department contain in Section 1 thereof, in part, the following:

> "Section 1. *Rights of lessee.*—The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations or other structures necessary to the full enjoyment thereof for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities . . ."

Thus, for a period of five years and, so long thereafter as oil and gas is produced in paying quantities, Section 17 of the Act and the terms of the lease itself conveyed to the petitioner the legal title, and full enjoyment of the leasehold and the "exclusive right and privilege to drill

for, mine, extract, remove and dispose of all the oil and gas deposits."

The Secretary in his reply brief contends that there is a difference insofar as the rights of a grantee is concerned between a grant in fee and one for a term of years. While there may be a distinction between the respective estates, there is no legal difference respecting the proprietary rights that attach to the grantee in a leasehold estate for years as compared with an estate in fee.

The Secretary asserts at page 28 of his brief:

> "At all events, the fact is that the Secretary has from the very beginning (of the Mineral Leasing Act of 1920), cancelled mineral leases issued by mistake in derogation of the rights of another applicant. *Alexander Leach* v. *Ernest Cornell*, A-1687 (August 13, 1921). *McCarthy* v. *Son*, A-2398 (March 4, 1922); *John A. Murray* v. *A.F. McNabb*, (February 14, 1923); *Irvin C. Smith* v. *William R. Buttolph*, A-5129 (June 2, 1923), and that practice has been allowed to continue undisturbed."

It is noteworthy, that the administrative decisions cited above by the government to support its contention that the administrative practice has been to annul leases from the very beginning of the Mineral Leasing Act are decisions cancelling oil and gas permits *only*, not leases. This fact can be readily verified by turning to Appendix "C" of the Secretary's brief where the administrative decisions cited above by the Secretary are numbered respectively in order of their appearance in the above citations as numbers 47 (p. 57), 45 (p. 57), 41 (p. 56), 39 (p. 56). As petitioner points out in his main brief at p. 14, under section 26 of the Mineral Leasing Act of 1920, Congress expressly authorized the Secretary to cancel oil and gas permits. Consequently, secretarial decisions which cancel oil and gas permits, as expressly authorized under Section 26 of the Act, fail to show an administrative practice "of cancelling leases." As a matter of fact, the most

casual reading of the synopses of the unpublished decisions of the Secretary, appearing in Appendix "C" of his brief, pages 51-57, reveals that prior to 1938 the only Secretarial cancellations were of oil and gas permits only. The earliest Secretarial cancellation of an oil and gas lease occurred on February 21, 1938 more than 18 years after enactment of the Mineral Leasing Act, in the case of Fenelon Boesche, A-21230 [1] (Sec. Br., p. 53) and here as the Secretary himself points out in the synopsis at p. 53 of his brief, the lease was "cancelled as the government had no title or interest in the land when the lease issued." Since there is no question of the government's title in the instant case, the 1938 Boesche decision can hardly serve as precedent for this case. If we examine the published decisions of the Secretary referred to in Appendix "B", p. 50 of his brief, the earliest reference in point of time is the case of *Moon* v. *Woodrow*, 51 I.D. 118 (1925). A casual reading of this case will reveal that this involved Secretarial cancellation of an oil and gas permit, not a lease. Further examination of the Secretary's Appendices B and C, pp. 50-57, shows that the next administrative cancellation of an oil and gas lease after the 1938 case of Fenelon Boesche, A-21230, occurred in 1947 in *Hill* v. *Williams and Liddell*, 59 I.D. 370 (1947) see p. 50 of the Secretary's brief. This is hardly the consistent administrative practice of administrative cancellation of oil and gas leases "from the very beginning of the Mineral Leasing Act of 1920" which the Secretary tries to establish with such great effort in his brief.

As a matter of fact, the claim of Secretarial power to cancel leases, first made in 1938 in the Boesche case, A-21230, supra, represented a complete reversal in Departmental policy. For, from the inception of the leasing program in 1920, until that time, the government had

[1] This is an earlier case not involved in this litigation.

taken the position that cancellation of leases was permissible only through judicial proceedings. The Department's position in this regard was stated in *Melish Consolidated Placer Mining Co.* v. *Testerman et al.*, 53 I.D. 205, 207, as follows: "The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts. (Sec. 31, Act of February 25, 1920)". See petitioner's main brief pp. 17 and 18.

The Secretary's brief pp. 37-42, discloses that it is established Departmental policy when there are conflicting applicants for an oil and gas lease to have the Land Manager of the Land Office determine whether the first applicant is qualified, and upon making that determination, issue a lease to him. After issuing the lease to the first applicant, the Manager then rejects the oil and gas application of the second applicant subject to the right of appeal. This is precisely what happened in the instant case. The Manager made a determination that petitioner Boesche was the first qualified applicant and a lease was issued to him on December 1, 1957. Thereafter, by decision dated January 24, 1958, the application of the second-applicant, Cuccia-Conley was rejected by the Manager subject to the right of appeal.

The Secretary at p. 40 of his brief, concedes that:

> "It can, of course, be disputed whether the ideal practice might not be to withhold issuance of the lease until final disposition of any appeals . . . but, in any event, it is peculiarly a question of internal procedure to be resolved by the Secretary."

The Secretary at p. 41 of his brief supports this course of action in part on the ground that after the lease has been issued by the Manager—

> "* * * the liklihood that a subsequent applicant will be able successfully to challenge the prior application is not deemed sufficiently substantial to warrant postponement of the issuance of the lease—a

> presumption that has been confirmed in practice by the infrequency of successful challenges by later-filing applicants."

The Secretary further indicates that this procedure has been adopted by the Department after "balancing the desirability of not taking action which might have to be undone against the desire to avoid needless delays in issuing leases . . ."

The Secretary delicately refrains from disclosing the principal reason why issuance of leases are not deferred pending disposition of conflicting applications on appeal. This reason, however, was given to the court below on page 20 of the Secretary's "Response to (Appellant's) Supplemental Memorandum" as follows:

> "The alternative would be . . . to withhold lease issuances until all possible administrative appeals to the Secretary in Washington had been exhausted. The evils to this alternative are many, one of them being the huge loss of Federal revenue from lease rentals for extended periods, some times many years, while numerous applicants exhaust their administrative remedies."

It is thus apparent that the principal reason for the established Departmental procedure of having the Manager issue the lease first, is that immediately, upon its issuance, the lessee's annual rental commences.

The Secretary claims, that the grantee who has thus been issued a lease can hardly complain because he is aware of the Department's procedures and he is on notice that, in the words of the Secretary, the "lease is merely tentative" (Sec. Br., p. 38) and that "he holds by a precarious title until the times for appeal have expired, or the appeals have failed." (Sec. Br., p. 40)

In the instant case, the lease was issued to Boesche, December 1, 1957 and the Secretary on appeal from the later-filing applicants held petitioner's lease for cancel-

lation on August 5, 1959, one year, eight months and 5 days after issuance of the lease. During this period Boesche had paid rentals for two of the 5 years of the primary term prescribed by Section 17 of the Mineral Leasing Act.

But if the issuance of the lease to Boesche had been sustained by the Secretary, as the Secretary claims is the result in most cases, Boesche for the first year, eight months and 5 days would have had a "precarious" and "tentative" lease with which nothing could be done. Does this mean that if his lease had been sustained by the Secretary his rental would have been reduced for the period of almost two years that his rights and benefits under the lease were deferred? Not at all. The grantee whose lease is being challenged and whose rights are deferred must pay for a full 5 year term although he receives in practice a term a good deal less than the 5 year term made mandatory by the Act. If Boesche's lease had been sustained by the Secretary his primary term would have been about 3 and one-third years for which he would have had to pay 5 year's rental. Thus, under the Department's procedure, the grantee whose lease has been sustained on appeal, but whose use has been postponed during the appeal interval, has in effect received a primary term of considerably less than the 5 years specified by the Act. But yet he must pay for a primary five-year term, though it has been substantially curtailed.

The startling aspect of this state of events is that the primary purpose for the Department's policy of having the Manager issue the lease first, is precisely for the purpose of collecting rentals immediately even though the benefits of the lease are denied the lessee pending the Department's so-called appellate review.

Aside from the question of the morality of collecting rentals from lessees while denying them the benefits and rights of the lease which are the consideration for the

rental payments, the Department's procedure violates Section 17 of the Mineral Leasing Act which provides that:

> "Leases issued under this section shall be for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities."

The statute says nothing about "tentative" and "precarious" leases resulting from the Secretary's procedures. Moreover, the curtailed primary terms which result from the Secretary's "appellate" procedures even if the issued lease is sustained, does not constitute the primary term of five years which Section 17 of the Mineral Leasing Act makes mandatory. The Secretary has no authority implied, or otherwise, to issue a lease for less than the primary term of 5 years, and in effect this is precisely what the Secretary does in all instances when, on appeal, he finally sustains the lease which has been issued by the Manager of a Land office.

The principles pronounced by this court in *Burke* v. *Southern Pacific R.R. Co.*, 234 U.S. 669, 698, 701, 709, (1913) requiring certainty of title in a patent issued by the government, are equally applicable to a lease. In that case this court stated:

> "A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant (patent) itself whether anything is granted or not, and, if anything be granted, what it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, than I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."
>
> "* * * the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those

of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and those rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of the officers. Diffeback v. Hawke, 115 U.S. 392, 406 . . .

"Lastly, it is urged that the railroad company accepted the patent with the mineral-land exception therein and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it or at least estopped to deny its validity. * * * The terms of the patent whereby the government transfers its title to public land are not open to negotiation or agreement. One patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement on the subject. They are not principals but agents of the law, and must heed only its will. *Diffeback* v. *Hawke*, 115 U.S. 392, 406; *Shaw* v. *Kellog*, 170 U.S. 312, 337, 343. Nor can they indirectly give effect to what is unauthorized when done directly . . . They cannot alter the effect which the law gives to a patent while it is outstanding."

The uncertainties and detrimental consequences resulting from the Secretary's asserted right to cancel leases administratively, and the self-styled "tentative" and "precarious" leases issued by the Department seriously impairs the practical operation of the Mineral Leasing Act. For as Judge Breitenstein stated in *Pan American Petroleum Corp.* v. *Ed Pierson*, 284 F. 2d 649 (1960):

"If there may be administrative cancellation of an oil and gas lease . . . the practical operation of the Mineral Leasing Act is seriously impaired. It is common knowledge that exploration for oil and gas

> is costly. The drilling of wells requires substantial financial risks and the expense of putting those wells on production and of marketing the product is burdensome. If continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed." (See p. 32 of petitioner's main brief).

The question before the court comes in this setting. Congress by a 1935 amendment to the Act,[2] and a later 1946 amendment[3] of Section 31 of the Mineral Leasing Act expressly provided that the Secretary may administratively cancel leases where there has been a violation by the lessee of the terms of the lease. Otherwise, Section 31 of the Act provides that the cancellation of an oil and gas lease is to be accomplished by judicial proceedings in an action filed in the United States District Court where the land or any part thereof is located.

The express power thus vested by congress in the Secretary in 1935 to cancel leases administratively when there has been a violation by the lessee of the terms of the lease, is the only administrative power to cancel an outstanding lease which is contained in the Act. And it is significant that this single grant by Congress of administrative power to cancel a lease is a narrow and limited power expressly restricted by clear and unambiguous language.

If the Secretary has the power to cancel a lease, apart from the provisions of the Mineral Leasing Act, the 1935 and 1946 amendments to the Mineral Leasing Act, wherein the Congress conferred on the Secretary a limited power to cancel leases, are superfluous and meaningless.

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[2] Act of Aug. 21, 1935, 49 Stat. 674.

[3] Act of Aug. 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

The Secretary's claim that his authority to cancel leases pre-exists the Mineral Leasing Act, and is not at all effected by the limitations on such authority contained in that Act, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). For as this court stated, through Mr. Justice Frankfurter in his concurring opinion in that case:

> "In any event nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice.
>
> "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of (cancellation) to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between . . . (Executive) and Congress." (Parenthetical material supplied).

CONCLUSION

For these reasons as well as those set out in our main brief, it is respectfully submitted that the Judgment of the court below should be reversed.

Respectfully submitted,

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